STATE OF MICHIGAN
SUPREME COURT

VERNON BOWMAN, Individually and as Personal Representative of the ESTATE OF KELLY M. BOWMAN,

Plaintiff-Appellant,

v

ST. JOHN HOSPITAL AND MEDICAL CENTER, and ASCENSION MEDICAL GROUP MICHIGAN d/b/a ROMEO PLAN DIAGNOSTIC CENTER, and TUSHAR S. PARIKH, M.D.,

Defendants-Appellees.

Supreme Court
No. 160291

Court of Appeals
No. 341640; 341663

BRIEF OF AMICUS CURIAE
MICHIGAN HEALTH AND HOSPITAL ASSOCIATION

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TABLE OF CONTENTS

INDEX OF AUTHORITIES

Cases

Statutes

Other Authorities

STATEMENT OF QUESTIONS PRESENTED

The order granting leave to appeal directed the parties to discuss these questions:

1. **Whether this Court's decision in *Solowy v Oakwood Hosp Corp*, 454 Mich 214 (1997), adopted the correct standard for application of the six-month discovery rule set forth in MCL 600.5838a(2)?**

   Amicus curiae Michigan Health and Hospital Association believes the answer is "Yes."

2. **If *Solowy* did not adopt the correct standard, what standard should the Court adopt?**

   Amicus curiae Michigan Health and Hospital Association believes that any standard should focus on and enforce a plaintiff's obligation to exercise due diligence based on the totality of available objective information about his or her injury and the possible causes.

3. **Whether the plaintiff in this case timely served her notice of intent and filed her complaint under MCL 600.5838a(2)?**

   Amicus curiae Michigan Health and Hospital Association believes this question is best discussed by the parties.

CERTIFICATION UNDER MCR 7.212(H)(3)

Richard C. Kraus, as counsel for the Michigan Health and Hospital Association, certifies that:

1. No counsel for a party authored this brief in whole or in part.

2. No party or counsel for a party made a monetary contribution used or intended to fund the preparation or submission of this brief.

3. No person other than the Michigan Health and Hospital Association made a monetary contribution used or intended to fund the preparation or submission of this brief.

STATEMENT IDENTIFYING INTEREST AS AMICUS CURIAE

The order granting leave to appeal invited the Michigan Health and Hospital Association to file a brief as amicus curiae.

The Michigan Health and Hospital Association ("MHA") is an association of hospitals, health systems, and other health care providers throughout Michigan that work together with patients, communities, and providers to improve health care for all Michigan citizens by addressing current issues that impact the ability of its members to deliver care. MHA's membership includes all of the state's community hospitals, from the largest urban teaching and trauma centers to small federally designated critical access hospitals serving Michigan's rural communities.

Established in 1919, MHA represents the interests of its member hospitals and health systems in both the legislative and regulatory arenas on key issues and supports their efforts to provide quality, cost-effective, and accessible care. MHA's mission is to advocate for hospitals and the patients they serve. In that role, it promotes better health within communities, improved quality and safety of patient care, and improved coverage for high-quality, affordable health care services. In addition, the Association provides members with essential information and analysis of health care policy and offers relevant education to keep hospital administrators and their staff current on statewide issues affecting their facilities. Using its collective voice, MHA advocates for its members before the legislature, the courts, government agencies, the media, and the public.

ARGUMENT

I. *Solowy* was correctly decided.

MHA believes that *Solowy v Oakwood Hosp Corp*, 454 Mich 214; 561 NW2d 843 (1997), was correctly decided. The standard for applying the discovery rule in MCL 600.5838a(2) to medical malpractice actions is well-grounded in the statutory language and comports with established principles of statutory construction.

Two statutes have a discovery-based tolling exception to the statute of limitations in malpractice actions. The first, enacted in 1975, applies generally to professional malpractice cases. MCL 600.5838(2). The second, enacted in 1986, is specific to medical malpractice actions. MCL 600.5838a(2). Both use the same language to govern when the tolling exception applies: "[A]n action involving a claim" may be commenced within the applicable statute of limitations "or within 6 months after the plaintiff discovers or should have discovered the existence of the claim, whichever is later."

The Legislature did not enact—and *Solowy* did not interpret—the statutory discovery rule in a vacuum. Both statutes were enacted against the background of a common-law discovery rule that was formally recognized as applicable to medical malpractice cases in *Johnson v Caldwell*, 371 Mich 368, 379; 123 NW2d 785 (1963).[1] This Court succinctly summarized the rule:

[1] *Johnson* was superseded by statute as stated in *Hawkins v. Regional Medical Laboratories, PC*, 415 Mich 420, 428 n 2; 329 NW2d 729 (1982). *Johnson* and other common-law discovery rule cases were overruled in *Trentadue v Buckler Lawn Sprinkler*, 479 Mich 378, 393; 738 NW2d 664 (2007). As discussed in Section I(A), *Trentadue* described the statutes with discovery-based tolling exceptions as reflecting the Legislature's approval of the common-law discovery rule and a "codification" of some uses of the rule in prior cases. *Id.* at 395.

> Simply and clearly stated the discovery rule is: The limitation statute or statutes in malpractice cases do not start to run until the date of discovery, or the date when, by the exercise of reasonable care, plaintiff should have discovered the wrongful act. *Id.*

The common-law rule was applied to other causes of action before and after *Johnson*.[2]

Under the common-law rule, a cause of action did not accrue until it was discovered or should have been discovered. *Id.* at 379. The effect was that a plaintiff had the full period of limitations in malpractice cases after discovery-accrual and could file a claim within two years afterwards, which could be long after the last treatment date. *Dyke v Richard*, 390 Mich 739, 747; 213 NW2d 185 (1973). Concerned with the extended period allowed under the common-law rule, the Legislature amended MCL 600.5838 in 1975 and employed a different approach to accomplishing the competing goals of protecting plaintiffs from having claims barred before knowing about them and to protecting defendants against facing liability for many years and defending against stale claims. *Sam v Balardo*, 411 Mich 405, 421 n 15; 308 NW2d 142 (1981).

The Legislature changed the nature of the discovery rule. Discovery was no longer treated as a matter of accrual. The statute provided that accrual occurs upon discontinuance of professional services "regardless of the time the plaintiff discovers or otherwise has knowledge of the claim." MCL 600.5838(1). The discovery rule instead operated as a tolling exception to the prescribed limitations period. As a result, a plaintiff no longer had the full limitations period after discovery. Instead, the Legislature shortened

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[2] See. e.g. *Williams v Polgar*, 391 Mich 6; 215 NW2d 149 (1974)(negligent misrepresentation); *Larson v Johns-Manville Sales Corp,* 427 Mich 301; 399 NW2d 1 (1986)(products liability); *Moll v Abbott Laboratories*, 441 Mich 1; 506 NW2d 816 (1993)(products liability); *Filcek v Utica Bldg Co*, 131 Mich App 396, 399; 345 NW2d 707 (1984)(negligent construction).

the tolling period so a plaintiff had to commence an action within six months after the claim was discovered or should have been discovered. MCL 600.5838(2).

Although the amended statute changed the effect of delayed discovery and reduced the time allowed for commencing an action, the Legislature created the statutory discovery rule by using the same language developed by this Court as the standard for determining when a plaintiff discovered a claim under the common-law rule. When holding that the common-law discovery rule applied to malpractice actions, *Johnson* said the limitations period did not "start to run until the date of discovery, or the date when, by the exercise of reasonable care, plaintiff should have discovered the wrongful act." 371 Mich at 379. When creating the discovery tolling exception in MCL 600.5838, the Legislature provided a professional malpractice claim that must be commenced within six months "after the plaintiff discovers or should have discovered the existence of the claim, whichever is later."

In 1986, the Legislature enacted MCL 600.5838a, which applied specifically to a medical malpractice action. The new statute changed when a medical malpractice claim accrued. Rather than the last-treatment date used for other malpractice claims, MCL 600.5838a(1) provided that the claim accrues "at the time of the act or omission that is the basis for the claim of medical malpractice . . . ." But the Legislature carried over two relevant provisions from MCL 600.5838. The claim accrues "regardless of the time the plaintiff discovers or otherwise has knowledge of the claim." MCL 600.5838a(1). And the claim must be commenced within 6 months after the plaintiff discovers or should have discovered the existence of the claim, whichever is later." MCL 600.5838a(2).

Once again, the Legislature elected to use the same concepts and language used by this Court when defining the contours of the common-law discovery rule. The rule enacted

for medical malpractice claims in MCL 600.5838a(2) was "in all significant respects unchanged" from the rule for other professional malpractice claims in MCL 600.5838(2). *Solowy*, 454 Mich at 221 n 2.

Under long-established principles of statutory construction, the Legislature is presumed to intend that statutory language derived from the common-law rule will have the same meaning and should be interpreted in the same manner. The standard adopted in *Solowy* was drawn from cases applying the common-law discovery rule and interpreting the same "should have discovered" language used by the Legislature in creating the tolling exceptions to the malpractice statutes of limitations.

Solowy properly interpreted MCL 600.5838a(2) and adopted the correct standard for the six-month discovery rule.

A. The statutory discovery rule should be interpreted consistently with the common-law discovery rule.

The language used by the Legislature to establish the statutory discovery rule in MCL 600.5838a(2) was derived from the precedent recognizing and applying the common-law discovery rule in malpractice cases. While the Legislature abrogated two aspects of the common-law rule—using the rule to delay accrual and allowing the full period of limitations after discovery—it did not modify the standard for the discovery rule. Instead, the Legislature employed the same language—"should have discovered"—used by this Court and the Court of Appeals as the standard for the common-law rule. When interpreting the statutory rule, the Legislature is presumed to intend that the statutory language will have the same meaning as it did when used in the common-law rule.

This principle of statutory interpretation was recognized in the earliest days of Michigan law. " [T]he rule of law has long been well understood that statutes are to be

construed in reference to the common law, and it is never to be presumed that the Legislature intended to make any innovation upon the common law any further than the case absolutely required in order to carry the act into effect." *Wales v Lyon*, 2 Mich 276, 282 (1851). This interpretative principle was explained ninety years ago in *Garwols v Bankers Tr Co*, 251 Mich 420; 232 NW 239, 240 (1930). The starting point is marked by the "many occasions" when Michigan courts "applied the rules of the common law in cases before it when the matter in dispute was not specifically controlled by a constitutional or statutory provision." *Id.* at 424. When common law rules are interpreted and applied over time, "[t]hese rules are firmly embedded in our jurisprudence, and it is presumed that the Legislature had them in mind when enacting statutes." *Id.*

> Statutes are likewise to be construed in reference to the principles of the common law; for it is not to be presumed that the legislature intended to make any innovation upon the common law, further than the case absolutely required. *Id.*

If the common law and the statutes "may stand together, they shall so stand." *Id.*

Cases of more recent vintage have followed the principle that "the Legislature is deemed to act with an understanding of common law in existence before the legislation was enacted." *Nation v WDE Elec Co*, 454 Mich 489, 494; 563 NW2d 233 (1997)(citing *Nummer v Treasury Dept*, 448 Mich 534, 544; 533 NW2d 250 (1995)). "The Legislature is presumed to know of the existence of the common law when it acts." *Wold Architects & Engineers v Strat*, 474 Mich 223, 233-234; 713 NW2d 750 (2006).[3]

[3] The common law supplies the background against which a legislature is normally presumed to legislate. *Comcast Corp v Natl Assn of African Am-Owned Media*, ___ US___; 140 S Ct 1009, 1014; 206 L Ed 2d 356 (2020). See, 2B Sutherland Statutory Construction § 50:2 (7th ed)("Where a statute attempts to restate the existing common law, the latter becomes an especially important factor to determine legislative intent.")

A correlative principle indicates that statutes in derogation of the common law are strictly construed and "will not be extended by implication to abrogate established rules of common law." *Velez v Tuma*, 492 Mich 1, 11–12; 821 NW2d 432 (2012)(quoting *Rusinek v Schultz, Snyder & Steele Lumber Co*, 411 Mich 502, 508; 309 NW2d 163 (1981)). In the same vein, "[w]here there is doubt regarding the meaning of such a statute, it is to be 'given the effect which makes the least rather than the most change in the common law.'" *Energetics, Ltd v Whitmill*, 442 Mich 38, 51, 497 NW2d 497 (1993).

These principles operate with special force when the Legislature, as it did when enacting the statutory discovery rules, employed the same language used in the precedent recognizing and interpreting the common-law rule. "[C]ommon-law terms adopted in statutes will be applied in the same manner in which they were applied at the time they were codified." *People v March*, 499 Mich 389, 398; 886 NW2d 396 (2016)(citing *People v Riddle*, 467 Mich 116, 125–126; 649 NW2d 30 (2002). An undefined statutory term that has "a settled, definite, and well known meaning at common law" is assumed to have the same meaning "unless a contrary intent is plainly shown." *Id.* The Legislature "presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed." *Hodge v State Farm Mut Auto Ins Co*, 499 Mich 211, 218; 884 NW2d 238 (2016)(quoting *Sekhar v United States*, 570 US ___, ___; 133 S Ct 2720, 2724, 186 LEd2d 794 (2013). "[W]hen enacting legislation, the Legislature is presumed to be fully aware of existing laws, including judicial decisions." *Alvan Motor Freight, Inc v Dep't of Treasury,* 281 Mich App 35, 41; 761 NW2d 269 (2008).

The legislative intent to carry forward the concept of the common-law discovery rule in the statutory discovery-based tolling exceptions was recognized in *Trentadue v Buckler Lawn Sprinkler*, 479 Mich 378; 738 NW2d 664 (2007). This Court reasoned that the comprehensive set of accrual and limitation statutes in the Revised Judicature Act demonstrated a legislative intent to abrogate the common-law discovery rule. *Id.* at 390-391. In doing so, *Trentadue* held the discovery rule remained in the types of cases governed by statutes with a tolling exception, including MCL 600.5838 and 600.5838a. *Id.* at 388. This Court said its decision did not "destroy the discovery rule," but instead "recognize[d] that the Legislature has comprehensively established the circumstances under which the rule should be applied." *Id.* at 394. *Trentadue* characterized the statutes including discovery tolling exceptions as the "codification of some of this Court's uses of the rule . . . ." *Id.* at 395. This analysis is entirely consistent with the statutory construction principles used when common-law terms are incorporated into legislation dealing with the same subject matter.

B. The standard adopted in *Solowy* and applied to MCL 600.5838a(2) is also derived from the common-law discovery cases.

When the discovery rule was added to the general malpractice statute of limitations in 1975, the Legislature had, as background, an understanding of the common-law discovery rule as explained in *Johnson* and other cases.[4] When the discovery rule for

[4] See, e.g., *Winfrey v Farhat*, 382 Mich 380, 383; 170 NW2d 34 (1969); *Dyke*, 390 Mich at 747; *Quinlan v Gudes*, 2 Mich App 506, 509-510; 140 NW2d 782 (1966); *Cates v Bald Estate*, 54 Mich App 717, 720–21; 221 NW2d 474 (1974).

The discovery rule had also been applied in other non-malpractice cases. See, e.g. *Williams v Polgar*, 391 Mich 6, 25; 215 NW2d 149 (1974)("statute of limitations does not

medical malpractice claim was enacted in 1986, the Legislature had the added benefit of additional cases applying both the common-law rule and MCL 600.5838(2).[5] Moreover, the Legislature's understanding of the phrase "should have been discovered" was supplemented by the numerous fraudulent concealment cases decided under statutes dating back many years. See, e.g., *Barry v Detroit Terminal R Co*, 307 Mich 226, 232–33; 11 NW2d 867 (1943)("plaintiff must be held chargeable with knowledge of the facts, which it ought, in the exercise of reasonable diligence, to have discovered"); *Weast v Duffie*, 272 Mich 534, 539; 262 NW 401 (1935)("a party will be held to know what he ought to know" by the exercise of ordinary diligence).

The "grave inequities which could follow the application of the last treatment rule" persuaded this Court to judicially adopt the discovery rule in malpractice actions. *Johnson v Caldwell*, 371 Mich 368, 379; 123 NW2d 785 (1963). The common-law discovery rule was applied in several cases over the ensuing decade, and then reaffirmed in *Dyke v Richard*, 390 Mich 739, 747; 213 NW2d 185 (1973). Although the statute of limitations then in effect required that a claim must be brought within two years after the last treatment date "regardless of the time the plaintiff discovers or otherwise has knowledge of the claim," this Court held the common-law discovery rule had not been abrogated. *Dyke* held a claim could be brought "within two years of the time when the plaintiff discovers, or in the

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begin running until the point where plaintiff knows or should have known of this negligent misrepresentation").

[5] See, e.g., *Biberstine v Woodworth*, 406 Mich 275, 276–77; 278 NW2d 41 (1979); *Sam v Balardo*, 411 Mich 405, 421 n 15; 308 NW2d 142 (1981); *Bonney v Upjohn Co*, 129 Mich App 18, 23–24; 342 NW2d 551 (1983); *Jackson v Vincent*, 97 Mich App 568, 572; 296 NW2d 104 (1980); *Adkins v Annapolis Hosp*, 116 Mich App 558, 565; 323 NW2d 482 (1982), aff'd 420 Mich 87; 360 NW2d 150 (1984).

exercise of reasonable diligence should have discovered, the asserted malpractice, whichever is later." *Id.* at 747.

The "discovered or should have discovered" standard for the common-law rule was employed in numerous cases after *Johnson* and then explored in detail in *Moll v Abbott Laboratories*, 441 Mich 1; 506 NW2d 816 (1993). *Moll* held the discovery rule applied in a pharmaceutical products liability action, so the statute of limitations began to run "when the plaintiff discovers or, through the exercise of reasonable diligence, should have discovered a possible cause of action." *Id.* at 5-6. The contours of the discovery rule were described:

- While the term "knows" is obviously a subjective standard, the phrase "should have known" is an objective standard based on an examination of the surrounding circumstances. *Id.* at 17-18.
- [A] plaintiff's cause of action accrues when, based on objective facts, the plaintiff should have known of an injury, even if a subjective belief regarding the injury occurs later. *Id.* at 18.
- "A plaintiff's cause of action accrues when he discovers or, through the exercise of reasonable diligence, should have discovered that he has a *possible* cause of action." *Id.* at 20 (quoting from *Bonney v Upjohn Co*, 129 Mich App 18, 33–34; 342 NW2d 551 (1983); emphasis original in *Bonney*).
- Once a claimant is aware of an injury and its possible cause, the plaintiff is aware of a possible cause of action. *Id.* at 24.
- "It is not necessary that a party should know the details of the evidence by which to establish his cause of action. It is enough that he knows a cause of action exists in his favor, and when he has this knowledge, it is his own fault if he does not avail himself of those means which the law provides for prosecuting or preserving his claims." *Id.* (quoting *Kroll v Vanden Berg*, 336 Mich 306, 311; 57 NW2d 897 (1953).

Moll held once again that "under the discovery rule, the statute of limitations begins to run when the plaintiff discovers or, through the exercise of reasonable diligence, should have discovered a possible cause of action." *Id.* at 29.

Solowy followed this line of cases when considering the discovery rule for medical malpractice cases in MCL 600.5838a. The statute provided that a claim accrues at the time of the allegedly negligent act or omission "regardless of the time the plaintiff discovers or otherwise has knowledge of the claim," but the limitations period is extended for six months "after the plaintiff discovers or should have discovered the existence of the claim, whichever is later." MCL 600.5838a(1) & (2).

This Court held that the "possible cause of action" standard from *Moll* should be applied to medical malpractice actions under MCL 600.5838a(2), just as it had been applied to legal malpractice claims under MCL 600.5838(2) in *Gebhardt v O'Rourke*, 444 Mich 535, 543; 510 NW2d 900 (1994). Under this standard, "[o]nce a plaintiff is aware of an injury and its possible cause, the plaintiff is equipped with the necessary knowledge to preserve and diligently pursue his claim." *Solowy*, 454 Mich at 223.

Solowy provided more guidance for applying the *Moll* standard. The standard does not require a plaintiff to know that the injury "was in fact or even likely caused by the defendant doctors' alleged omissions." *Id.* at 224.

> While according to *Moll*, the "possible cause of action" standard requires less knowledge than a "likely cause of action standard," it still requires that the plaintiff possess at least some minimum level of information that, when viewed in its totality, suggests a nexus between the injury and the negligent act. In other words, *the "possible cause of action" standard is not an "anything is possible" standard*. *Id.* at 226 (emphasis added).

A "flexible approach in applying the standard" is required in delayed diagnosis cases. A court "should consider the totality of information available to the plaintiff, including his

own observations of physical discomfort and appearance, his familiarity with the condition through past experience or otherwise, and his physician's explanations of possible causes or diagnoses of his condition." *Id.* at 227. In conclusion, *Solowy* cautioned that "when the cause of a plaintiff's injury is difficult to determine because of a delay in diagnosis, the 'possible cause of action' standard should be applied with a substantial degree of flexibility." *Id.* at 230.

> In such a case, courts should be guided by the doctrine of reasonableness and the standard of due diligence and must consider the totality of information available to the plaintiff concerning the injury and its possible causes. *Id.*

MHA believes *Solowy*'s standard for determining when a plaintiff "should have discovered the existence of the claim" is consistent with the language in MCL 600.5838a(2). The Legislature chose to craft its discovery tolling exception with the same language used by this Court in defining the common-law discovery rule. From *Johnson* through *Moll*, "should have discovered" has been understood to require a plaintiff to exercise reasonable diligence based on the available information. The "possible cause of action" standard was was adopted in *Moll* after considering the purposes of the discovery rule and statute of limitations. While *Moll* applied the common-law discovery rule, *Solowy*'s adoption of the standard in a medical malpractice governed by MCL 600.5838a(2) is consistent with the statutory language.

II. Solowy should not be overruled.

MHA agrees with defendants and the other amici that the standard adopted in *Solowy* is well-grounded in the statutory language, consistent with the understanding of the common-law discovery rule adopted by the Legislature, and concordant with the legislative policies represented by the decision to retain the discovery rule in malpractice actions.

But if this Court has reason to question *Solowy*'s adoption of the "possible cause of action" standard, the case and its precedential value should not be overruled. The stare decisis analysis begins with a baseline: "That a case was wrongly decided, by itself, does not necessarily mean that overruling it is appropriate." *City of Coldwater v Consumers Energy Co*, 500 Mich 158, 172; 895 NW2d 154 (2017). The analysis is "not to be applied mechanically" but should consider "whether the decision defies practical workability, whether reliance interests would work an undue hardship were the decision to be overruled, and whether changes in the law or facts no longer justify the decision." *Id.*

"[A] rule of decision defies practical workability if it has proved difficult to apply or implement." *In re Ferranti*, 504 Mich 1, 26; 934 NW2d 610 (2019). The standard in *Solowy*, drawn from earlier precedents like *Johnson* and *Moll* and their progeny, has been practical and workable. The cases have established and explained the principles "with the doctrine of reasonableness as a constant and the standard of due diligence as a guide . . . ." *Solowy*, 454 Mich at 226 (quoting *Moll*, 444 Mich at 32-33 (Boyle, J., concurring in part and dissenting in part).

Whether a plaintiff "should have discovered" a claim is determined by an objective standard based on the perspective of a reasonable layperson. *Solowy* adopted a standard under which a court "should consider the totality of information available to the plaintiff," including the factors specified in MCL 600.5838a(2) and other items such as a plaintiff's observations of physical discomfort and appearance, knowledge about the condition based on past experience, and the treating physician's explanations of possible causes or diagnoses of the condition. 454 Mich at 227 & n 4. Consideration of these sort of facts is familiar territory for trial and appellate courts as well as attorneys in many contexts,

including the numerous statutes identified by St. John that depend on similar elements of constructive discovery and knowledge. [St. John brief, p. 43 n. 11]. This has been a workable and practical standard for courts, when applying the common-law discovery rule and the statutory tolling exceptions.

Solowy provided an important caution and further guidance: "the 'possible cause of action' standard is not an 'anything is possible' standard." 454 Mich at 226. *Solowy* emphasized the standard must be flexibly applied so it "still requires that the plaintiff possess at least some minimum level of information that, when viewed in its totality, suggests a nexus between the injury and the negligent act." *Id.* This directive further helps courts when considering the statutory discovery rule. "[I]t is the general rule that exceptions to statutes of limitation are to be strictly construed." *Tucker v Eaton*, 426 Mich 179, 187; 393 NW2d 827 (1986)(quoting *Mair v Consumers Power Co* 419 Mich 74, 80; 348 NW2d 256 (1984).

The practical workability of the objective standard was explained in *Lemmerman v Fealk*, 449 Mich 56; 534 NW2d 695 (1995). Balancing the competing interests of plaintiffs and defendants "is facilitated where there is objective evidence of injury and causal connection guarding against the danger of stale claims and a verifiable basis for the plaintiffs' inability to bring their claims within the statutorily proscribed limitation period." *Id.* at 66-67. The limitations dispute can be decided "based on evaluation of a factual, tangible consequence of action by the defendant, measured against an objective external standard." *Id.* at 68.

Courts have been able to apply the *Solowy* standard in numerous cases over the past two decades. The results have differed based on the specific facts, as demonstrated by the

trio of discovery cases recently before this Court. Here, the Court of Appeals capably explained why the facts regarding Mrs. Bowman's breast cancer diagnosis were close to those in *Solowy* and *Hutchinson v Ingham Co Health Dep't*, 328 Mich App 108; 935 NW2d 612 (2019), and why they differed from those considered in *Jendrusina v Mishra*, 316 Mich App 621; 892 NW2d 423 (2016). The panel in *Hutchinson* was able to cogently explain why it reached a different result than *Jendrusina*. And the *Jendrusina* panel distinguished the facts in that case from those in *Solowy*. The differing outcomes in the three cases simply demonstrates that reasonable judges commonly reach different conclusions when applying settled law to the particular facts of a case. It does not mean the settled law, i.e. *Solowy*, is either wrong or unworkable.

There is a strong reliance interest in having the discovery rule in MCL 600.5838a(2) interpreted consistently with the legislative language derived from the common-law discovery rule that dates back to *Johnson* in 1963. *Solowy* has supplied the standard for applying the discovery rule in medical malpractice cases since 1997, using a standard heavily drawn from *Moll*, which was decided in 1993. *Johnson*, *Moll*, and *Solowy* have developed a standard that respects and enforces the strong interest of the statutes of limitations in finality, time limitations on exposure to liability, and protection against stale claims.

Upsetting that careful balance by discarding a long-established and workable standard would unnecessarily undermine reliance interests of both plaintiffs and defendants. It would "produce not just readjustments, but practical real-world dislocations." *Bezeau v Palace Sports & Entmt, Inc*, 487 Mich 455, 466; 795 NW2d 797 (2010). The malpractice statutes of limitations were amended with the specific purpose of

shortening the time during which defendants would be exposed to liability. *Sam,* 411 Mich at 421 n 15. MHA shares St. John's concern that rejecting *Solowy*'s standard would not only upset decades of precedent in professional and medical malpractice actions, it would also jeopardize the precedent interpreting the numerous Michigan statutes that use "should have discovered," "should have known," or similar language as the governing standard. [St. John brief, pp. 42-43].

Trentadue noted that the common-law discovery rule does not create reliance interests because "[a] plaintiff does not decide to postpone asserting a claim because he relies on the availability of extrastatutory discovery-based tolling." 459 Mich at 393. This Court recognized that "[t]o the extent reliance interests figure into the analysis, it is the expectations of defendants . . . that are harmed when a plaintiff brings claims long after an event occurred." *Id.* Moreover, this case does not involve the common-law discovery rule or what *Trentadue* called "extrastatutory discovery-based tolling." It involves a precedent interpreting the standard for statutory tolling, where the Legislature has provided a narrow and strictly construed exception to the statute of limitations for plaintiffs who can meet the burden of proving that they did not discover and should not have discovered the existence of their claim before the statute of limitations expired. MCL 600.5838a(2).

Potential defendants in medical malpractice cases are entitled to the protections afforded by the principle that exceptions to the statute of limitations are narrowly and strictly construed. *Tucker*, 426 Mich at 187. *Solowy* was careful to maintain a standard that protected plaintiffs who might forfeit claims through no fault of their own while also maintaining "the legitimate legislative purposes behind the rather stringent medical malpractice limitation provisions . . . ." 454 Mich at 230. Plaintiff argues for a much more

lenient standard for the discovery-based tolling exception, even to the point of maintaining that a physician must tell a patient that a previous treater's actions were wrong before a claim "should have been discovered." [Plaintiff brief, pp. 20-23]. Discarding *Solowy* would unduly prejudice defendants in medical malpractice actions who have relied on a standard developed in a line of cases dating back for almost sixty years that provide a reasonable and workable balance.

The final consideration in the stare decisis analysis is "whether changes in the law or facts no longer justify the decision." *City of Coldwater*, 580 Mich at 172. There has been no change in law since *Solowy* was decided in 1996. The statutory discovery rules in MCL 600.5838(2) and 600.5838a(2) have not been amended since they were enacted in 1975 and 1986. The facts, of course, depend on the particular circumstances of each case, which is precisely what Solowy emphasized. 454 Mich at 226-227. But the facts surrounding the allegedly delayed cancer diagnoses in *Solowy*, *Hutchinson*, and this case are quite similar and have resulted in similar outcomes.

III. Any standard adopted by this Court should be based on a plaintiff's obligation to exercise reasonable diligence based on objective facts.

The order granting leave directs the parties to address what standard should be adopted if this Court concludes that *Solowy*'s standard is incorrect. MHA is frankly unable to suggest a standard that is more faithful than *Solowy* to the statutory language or one that is more workable in deciding whether a plaintiff should have discovered the existence of a claim. The standard used by *Johnson* and *Moll* and adopted in *Solowy* best accomplishes the goal of balancing a plaintiff's interest in having sufficient time to pursue a cause of action and a defendant's interest in not being exposed to liability for extended periods and not

having to defend stale claims. *Solowy* followed the direction of these cases and agreed the "possible cause of action" standard yielded the "best balance" of these competing concerns. 454 Mich at 222. Because the Legislature is presumed to have enacted the statutory discovery rule with an understanding of these common-law principles, *Solowy*'s standard is based on a correct interpretation of MCL 600.5838a(2).

A. The alternatives proposed by defendants are reasonable interpretations of MCL 600.5838a(2).

If this Court decides a different standard should be adopted, MHA believes that the alternatives proposed by defendants are consistent with and reasonably interpret the statutory language. [St. John brief, p. 46; Parikh brief, pp. 43-46]. While there is a slight difference in the wording of their proposed alternatives, the core principle is the same: the discovery rule requires a plaintiff to act with reasonable diligence based on objective facts. As Justice Boyle stated in *Moll*, the choice of adjectives—possible, probable, or likely—is less important than the "quantum of fact triggering the discovery rule." 441 Mich at 32 (Boyle J., concurring in part and dissenting in part). The critical inquiry is whether a plaintiff has exercised reasonable diligence based on the available objective facts and should have learned of a possibly actionable cause for his or her injury. *Id.* This standard comports with the Legislature's allocation of the burden on a plaintiff to prove he or she "neither discovered nor should have discovered the existence of the claim" at least six months before the applicable statute of limitations expired. MCL 600.5838a(2).

An important consideration in determining a new standard is the principle that exceptions to statutes of limitations must be narrowly and strictly construed. *Mair*, 419 Mich at 80. There is, of course, a legitimate interest in dealing with the situation where an individual's potential cause of action may be time-barred before he or she has reason to

know there may be a claim. This interest has been recognized by the Legislature and in the common-law discovery rule. But the case law also emphasizes the purpose of statutes of limitations to "'compel the exercise of a right of action within a reasonable time so that the opposing party has a fair opportunity to defend'; 'to relieve a court system from dealing with "stale" claims, where the facts in dispute occurred so long ago that evidence was either forgotten or manufactured'; and to protect 'potential defendants from protracted fear of litigation.'" *Chase v Sabin*, 445 Mich 190, 199; 516 NW2d 60 (1994)(quoting *Bigelow v Walraven*, 392 Mich 566, 576; 221 NW2d 328 (1974). The Legislature had these interests in mind when amending MCL 600.5838 to add the discovery-based tolling exception. *Sam*, 411 Mich at 421 n 15. These policies are furthered by requiring that a "plaintiff must act diligently in discovering his cause of action and cannot simply sit back and wait for others to inform him of his possible claim." *Grimm v Ford Motor Co*, 157 Mich App 633, 639; 403 NW2d 482 (1986).

B. Plaintiff's proposed standard for MCL 600.5838a(2) is contrary to statutory construction principles.

MHA agrees with defendants that the standard proposed by plaintiff is not consistent with the language used in MCL 600.5838a(2). Their briefs persuasively demonstrate why the proposed interpretation is unsupported by the statutory language and contrary to established principles of construction. [St. John brief, pp. 19-25; Parikh brief, pp. 46-48].

Plaintiff argues that *Solowy* misinterpreted the phrase "should have discovered" to mean "could have discovered." [Plaintiff's brief, pp. 14-16]. The argument is based on the *Jendrusina* majority's reference to a selected definition of "should" and "could" in the New Oxford American Dictionary. 316 Mich App at 62. But a footnote refers to definitions more

applicable to the how the Legislature used the word "should." *Id.* at 62 n 1. The word "should" is an auxiliary verb in the phrase "should have discovered." When "used in an auxiliary function," the word "should" is meant "*to express obligation*." Merriam-Webster's Collegiate Dictionary (11th ed)(emphasis added). See New Oxford American Dictionary ("used to indicate obligation, duty, or correctness").

The "obligation" on a plaintiff is the "standard of due diligence." *Solowy*, 454 Mich at 226 (quoting *Moll*, 444 Mich at 32-33 (Boyle, J., concurring in part and dissenting in part). A plaintiff's obligation to exercise reasonable care and diligence has always been central to determining what "should have been discovered." *Johnson,* 371 Mich at 379; *Dyke,* 390 Mich at 747. And the duty imposed on a plaintiff to reasonably pursue claims has always been integral to the policies for adopting statutes of limitations. *Id.,* at 23 (quoting *Lothian v Detroit*, 414 Mich 160, 166-167; 324 NW2d 9 (1982)). The "possible cause of action" standard explained in *Moll* and adopted in *Solowy* is a correct and reasonable interpretation of the phrase "should have discovered."

Plaintiff's argument also ignores the understanding of "should have discovered" when the Legislature incorporated that phrase from the common-law discovery rule when enacting MCL 600.5838a(2). Plaintiff tries to parse MCL 600.5838a(2), reading each word and phrase separately and in isolation. When fully assembled into plaintiff's proposed standard, the effect would be to so distort the statutory language that actual discovery would be required. If a plaintiff must be told by a physician that the original treater committed malpractice, the statutory standard would be rewritten as "must have discovered." A reasonable layperson could not disregard such a direct and unambiguous indicator of a potential claim. Indeed, being told by a physician there has been malpractice

would result in actual discovery of a claim. Plaintiff's proposed standard would eliminate "should have discovered" from the statutory discovery rule.

CONCLUSION

MHA believes the standard adopted in *Solowy* is a correct interpretation of MCL 600.5838a(2) and should be retained.

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